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No. 94-219

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

STATE OF FLORIDA, and LAWTON CHILES, Governor of Florida,

Cross-Petitioners,

vs.

SEMINOLE TRIBE OF FLORIDA,

Cross-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petition for Writ of Certiorari filed by the Seminole Tribe in No. 94-12 sets forth the statement of this case. The Respondents/Cross-Petitioners have agreed that the decision below presents conflict among the circuits and that the decision below presents "an unanswered question of importance which

should be decided by this Court." (Response to Petition for Writ of Certiorari, p. 1).

The Respondents' Cross-Petition seeks review of a single paragraph within the decision below. That paragraph opines that a state's invocation of Eleventh Amendment immunity would, under the Indian Gaming Regulatory Act, permit a Tribe to apply to the Secretary of the Interior, and allow the Secretary to prescribe regulations for the conduct of class III gaming on tribal lands. *Seminole Tribe of Florida v. State of Florida,* 11 F.3d 1016, 1029 (11th Cir. 1994) (Cross-Petitioner's Appendix A-25-26).

For the reasons set forth below, the Cross-Petition seeking review of that paragraph should be denied.

SUMMARY OF THE ARGUMENT

The Cross-Petitioners prevailed below. The judgment of the Eleventh Circuit Court of Appeals was that the Seminole Tribe's suit should be dismissed on Eleventh Amendment grounds. A prevailing party cannot seek review of a judgment which it won.

The State of Florida and its Governor seek certiorari to obtain excision of a single paragraph in the decision below. That paragraph is, even according to the State, "dicta." In addition, its language does not present any present case or controversy. Therefore, there is no basis for granting certiorari on the Cross-Petition.

REASONS FOR DENYING THE CROSS-PETITION

The State of Florida prevailed below by successfully invoking Eleventh Amendment immunity and securing dismissal, with prejudice, of the Seminole Tribe's Indian Gaming Regulatory Act (IGRA) suit. The paragraph which triggered the Cross-Petition is in Part V of the decision below:

> The final question we must resolve is whether all provisions for state involvement in class III gaming also fail, as the tribes contend. We hold that they do not. IGRA contains an explicit severability clause. § 2721; and we find no "strong evidence" to ignore that plain congressional directive. *See Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 686, 107 S. Ct. 1476, 1481, 94 L.Ed.2d 661 (1987). Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. § 2710(d)(7) (B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

(11 F.3d at 1029, Cross-Pet. App. A-25-26).

The State characterizes the paragraph as "dicta:" "The Court's dicta in part V creates a remedy inconsistent with the plain language of the statute. . . ." (Cross-Petition, p. 15) (footnote omitted). This Court does not review "dicta." Nor does it review statements in opinions; it reviews "judgments." *Johnson v.*

DeGrandy, 114 S. Ct. 2647, 2653 n.5 (1994). Judgment was entered in favor of the State. Certiorari is not available to a party who has won the judgment below. *Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939); *see also California v. Rooney*, 483 U.S. 307 (1987), precluding a winning State from claiming a loss because the Court of Appeals' analysis disturbed the State:

> Here, the judgment of the Court of Appeal was entirely in the State's favor — the search warrant which was the sole focus of the litigation was deemed valid. . . . The Court of Appeal's use of analysis that may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of this Court's review. (footnote omitted).

483 U.S. at 311; *see also Electrical Fittings Corp. v. Thomas*, 307 U.S. 241, 242 (1939):

> A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree.

Part V's "dicta" was not necessary to support the Eleventh Circuit's Eleventh Amendment decree. Thus no case supports the Cross-Petition.

The State's Cross-Petition also fails the article III, § 2, case or controversy test. Since the Secretary of the Interior has taken no action adverse to the State, the State's concerns are not ripe for review; there is no injury "fairly traceable to the [Secretary's] allegedly unlawful conduct and likely to be redressed by the

requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). A footnote in the Cross-Petition says the ". . . dicta . . . has generated applications to the Secretary of the Interior pursuant to the language of [part V of the opinion below]." (Cross-Petition at 9 n.2). But the Cross-Petition does not allege injury; it does not even suggest that any action by the Secretary is "threatened." The State's concerns are constructed on "could be's:" "The State of Florida has negotiated in good faith, but under Part V of the opinion, could be faced with regulations imposed by the Secretary of the Interior for class III gambling." (Cross-Petition at 15 n.4). *Compare California v. Rooney*:

> There are too many "ifs" in that proposition to make our review appropriate at this stage. Even if everything the prosecution fears comes to bear, the State will still have the opportunity to appeal such an order, and this Court will have the chance to review it, with the knowledge that we are reviewing a state court *judgment* on the issue. . . .

487 U.S. at 312-313. (emphasis in original, footnote omitted).

The same principle applies here. If the Secretary proposes regulations, and if the Secretary adopts regulations, and if those regulations are unacceptable to the State, then the State can seek relief, and this Court would ultimately be able to consider a federal court's judgment squarely presenting the issue.

There is no principled basis for granting review on the Cross-Petition where the Cross-Petition, the decision below, and the undisputed facts demonstrate that the Cross-Petitioners won below and are suffering no injury, other than a dislike of the "dicta" spawned by their victory.

The relief requested by the State's Cross-Petition demonstrates that its "injury" is not actual, but editorial:

> This Court should grant certiorari in this cross-petition and remand this case to the appeals court below with instructions to revise its opinion, excising the discussion in part V.

(Cross-Petition at 24.) That request sounds more like surgery than certiorari. Neither is necessary in this case.

CONCLUSION

For the foregoing reasons the Cross-Petition for Writ of Certiorari filed by the State of Florida and Lawton Chiles, Governor of the State of Florida, should be denied.

Respectfully submitted,

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